

Gowrishankar and Another

Vs

Joshi Amba Shankar Family Trust and Others

Civil Appeal No. 3684 of 1996

(CJI A. M. Ahmadi, M. K. Kukherjee, Sujata V. Kanohar JJ)

22.02.1996

ORDER

1. Special leave granted. Heard the learned counsel for the parties.
2. This appeal is directed against the judgment and order dated 11-7-1995 rendered by the Madras High Court disposing of two original side appeals. Facts leading to this appeal and relevant for its disposal are as under.
3. By a deed of declaration dated 15-1-1934 one Ambasanker Joshi created Respondent 1-Trust in relation to his three immovable properties, one of which is house and Ground No. 429 (new No. 162) at Mint Street, Madras (hereinafter referred to as the 'property') for the benefit of his poor relations and for other charitable and pious purposes. As the trustees were finding it difficult to carry out the purposes of the Trust for paucity of funds they moved the High Court in 1979 for modification of the terms of the Trust deed so as to empower them to sell the above properties. By its order dated 28-11-1983 the High Court granted such power subject to the condition that it would be exercised only with the permission of the court and the concurrence of 3/4th of the total number of trustees in office.
4. Armed with the above order the trustees invited offers for purchase of the property and on receipt of some offers sought permission of the High Court to sell the same at the highest price offered which was granted on 9-2-1984. However, in spite of the permission so granted, the trustees did not sell the property at the highest price offered, which was Rs. 3,15,000 till then, and instead thereof invited, and received, fresh offers including one from Respondents 10 to 15 (hereinafter referred to as the 'purchasers') who are brothers and members of a joint family, for Rs. 9,00,000. By a resolution dated 7-12-1989 the trustees accepted the offer of the purchasers and entered into a formal agreement for sale with them on 15-12-1989, after receiving a sum of Rs. 1,50,000 as earnest money. Then on 15-1-1990, the trustees applied for the clearance certificate required under the Income Tax Act for sale of the property. A week thereafter - on 23-1-1990 to be precise - the appellants herein sent a letter to the trustees which reads as under :

"By an order dated 9th February, 1984 in Application No. 68 of 1984 in CS No. 530 of 1979 on the original side of the High Court at Madras His Lordship Mr. Justice Sangottuvelan was pleased to permit the Trust, the applicant in the above application to sell the immovable property together with the superstructure thereon bearing door No. 162 (old No. 420), Mint Street, Madras-79 at the highest price offered.

As offers were not called for by due publication in the press for which we were waiting so far, we

are now offering for the said property together with the superstructure, fittings and fixtures, being door No. 162 (new) Mint Street, Madras-79 a sum of Rs. 14,20,000 (Rupees fourteen lakhs and twenty thousand only) which price is negotiable.

We have been in occupation of the said premises for over a half century running a hotel industry, a portion thereof being occupied for our personal residential purposes, paying rent to the Trust regularly and without default during all these years. Since we are keenly interested in the property, we therefore request you to consider the offer, which is negotiable favourably. Kindly acknowledge and let us have a favourable reply at the earliest.

Thanking you."

5. In acknowledging the above letter the trustees intimated the appellants, by letter dated 26-2-1990, that their offer to purchase the property for Rs. 14,20,000, would be placed before the meeting of the trustees and the decision taken would be communicated to them; and, accordingly, asked them to wait for the result of the meeting.

6. Thereafter on 16-3-1990 the Trust through its managing trustee, filed an application in the High Court (Application No. 1660 of 1990) seeking permission to sell the property to the purchasers for Rs. 9,00,000 as, according to them, it was the highest offer, and to execute and register the necessary deed of sale.

7. By an order dated 29-3-1990 a learned Judge of the High Court granted the permission sought for and directed the trustees to invest the sale proceeds, in such manner as the majority of them might deem fit and proper. Pursuant to the said order sale deeds were executed in favour of the purchasers on 12-4-1990, and all the tenants of the property, including the appellants, were intimated of such sale.

8. Thereafter on 3-7-1990 the appellants sent a notice, through their advocate, to the Trust, the trustees and the purchasers alleging that they had played a fraud on the court, the Registration Department and the Income Tax Department when they declared that the property fetched a highest offer of Rs. 9,00,000 as its price, in that, they suppressed the fact that they (the appellants) had ordered to purchase the property for Rs. 14,20,000. It was further alleged that the purchasers were aware of their offer as they were informed of the same through one of them (Respondent 11). The appellants gave out that in case the property was not sold to them at the price offered by them on or before 10-7-1990 they would not only take action to set aside the sale but lodge complaints with the registration and income tax departments and also move the High Court for taking action against the Trust for filing false affidavit. In their separate replies thereto, the respondents denied the allegations made by the appellants; and the purchasers stated in their reply, inter alia, as follows :

"Our client made enquiries with the trustees with regard to your statement that your client had offered to buy the property for Rs. 14,20,000 by his letter dated 23rd January, 1990. Our client has been informed by the trustees that though your client had issued the letter, he did not evince any interest in finalising the transaction nor did he take any further step for effecting purchase. It is also stated by the vendors (trustees) that your client had sought complete vacant possession and stipulated other conditions making it clear that he was not keen on buying the property but only wanted to stop any sale of the property so that he could continue in the premises as a tenant. Your client is occupying the premises on a nominal rent and he was always

interested in continuing in the premises on the same terms.

Our client further states that the trustees had informed him that your client had claimed from them some amount to vacate the premises, which the trustees had declined. After our client purchased the property when they demanded vacant possession, your client again demanded payment of Rs. 2 lakhs which was refused by our client, who threatened to take legal action by evicting him from the premises."

9. In view of the stand so taken by the respondents, the appellants filed an application on 28-7-1990 (being No. 801 of 1990) for setting aside the order permitting the sale in favour of the purchasers. In the application they stated, inter alia, as follows :

"The first respondent ought to have informed this Hon'ble Court my offer of Rs. 14,20,000 as otherwise the Hon'ble Court would not have permitted the sale for Rs. 9,00,000. Obviously a fraud has been committed and false affidavit has been filed to misdirect this Hon'ble Court.

Respondents 10 to 15 were quite aware of my offer much before the filing of the application and they have colluded with Respondents 1 to 9 in knocking away the schedule property for Rs. 9,00,000."

10. In contesting the application the managing trustee filed a counter-affidavit detailing the facts leading to the passing of the order permitting the sale of the property (which we have noticed earlier). He categorically denied that there was any fraud or collusion with the purchasers and asserted that the trustees had acted bona fide. In their counter-affidavit the purchasers claimed that they were bona fide purchasers and they had no knowledge whatsoever of the alleged offer made by the appellants. Besides, they reiterated the stand taken by them in their reply to the notice of the appellants dated 3-7-1990. While the application for setting aside the sale was awaiting disposal, the appellants filed a further affidavit on 19-1-1994 offering to pay a total sum of Rs. 19,40,000 for purchasing the property.

11. After hearing the parties and taking into consideration all facts, including the above offer, the learned Judge allowed the application principally on the ground that the trustees had played fraud on the court by not disclosing the highest offer of the applicants (the appellants herein) and colluding with the purchasers and passed the following order :

"That on receiving a sum of Rs. 19,40,000 (Rupees nineteen lakhs, and forty thousand only) the 1st respondent herein, do execute and register the sale deed in respect of the property more fully set out in the Schedule hereto in favour of the applicants herein;

That from and out of the said sale consideration the earlier purchasers/Respondents 11 to 15 herein, shall be paid a sum of Rs. 9,00,000 (Rupees nine lakhs only) together with the cost of the stamp papers and the registration charges and that the balance amount shall be appropriated for the Trust; and

That Respondents 1 to 8 herein (the trustees) do pay the cost of Rs. 10,000 (Rupees ten thousand only) to Respondents 11 to 15 herein, and the said costs shall be borne by them personally and not out of the Trust Fund."

12. Aggrieved by the above order the Trust and the purchasers preferred two separate appeals before the Division Bench ('Bench' for short) which were allowed and the order of the learned Single Judge was set aside. In setting aside the order the Bench held that the finding of the teamed Judge that the permission to sell the property was obtained by fraud was patently wrong and that the offer of the appellants was not a bona fide one. It further held that the purchasers had bona fide purchased the property for value without notice of the offer of the appellants dated 23-1-1990. With the above findings and, in view of an affidavit filed by the purchasers before it expressing their willingness to pay Rs. 19,40,000 for the property - the same amount as offered by the appellants before the Single Judge - the Bench passed the following order :

"Consequently, we direct Respondents 10 to 15 to pay a sum of Rs. 10,40,000 being the difference between the amount already paid by them as sale price for the properties and the sum of Rs. 19,40,000. The said amount shall be paid to the Trust on or before 30-9-1995.

With the above directions, the appeals are allowed. The order of the learned Single Judge dated 2-2-1995 is set aside. The applicant shall pay the costs of the appellants. In each appeal, the counsel's fee is fixed at Rs. 5000."

13. Having heard the learned counsel for the parties and carefully perused the entire materials on record we are unable to sustain the impugned order. Admittedly, in their application filed on 10-3-1990, seeking permission to sell the property the trustees did not disclose the offer made by the appellants on 23-1-1990 and, as already noticed, such non-disclosure prompted the Single Judge to conclude that the respondents practiced fraud upon the court. The Bench, on the other hand, held that failure on the part of the trustees to make a reference to the offer of the appellants while seeking permission of the court to sell the property did not amount to fraud on their part. It appears that in arriving at the above conclusion, the Bench relied upon the following statements made in the counter-affidavit filed by the trustees in opposing the application of the appellants for setting aside the sale as, according to the Bench, those statements were not controverted by filing a reply thereto :

"However, since an offer was made by the applicants, the trustees discussed the matter. In the course of the discussion, it was made known to the applicants that the sale of the property would be as is where is condition and the applicants were required to confirm that the offer would be for sale without vacant possession. The applicants promised to come back, but never responded thereafter. The applicants did not follow up the matter further and it was very evident from the conduct of the applicant that they were only trying to protract the matter and put for in the agreed sale to Seshmal Jain and five others.

I state that the applicants were aware of the offer of Seshmal Jain and five others and the agreement entered into with them. The attempt of the applicants was only to sabotage the said proposed sale. The applicants were occupying substantial portion of the property for a nominal rent of Rs. 275 and they had succeeded in their attempt at preventing the sale of the property for the past so many years. Even after obtaining the court permission in 1984, they were able to prevent the sale by dissuading intending purchasers. They merely wanted to continue in the property paying a nominal rent, which would be possible only if they continued to own the property.

I state that the applicants were aware of every step that was being taken towards the

sale of the property.

Adverting to para 7, I state that at the time the application was made to this Hon'ble Court, there was no valid offer by the applicants as alleged. The applicants had made an offer on the 23rd January, 1990, but had wanted vacant possession. Since that was not possible, they had not pursued the offer. It was evident from the conduct of the applicants that they were not serious about the alleged offer made on 23rd January, 1990. The trustees have acted bona fide. I stoutly deny the averment that a fraud was committed or a false affidavit filed as alleged by the applicants nor was this Hon'ble Court misdirected."

14. In our considered view the above approach of the Bench in dealing with the matter was patently wrong for instead of deciding the moot question as to whether the trustees had suppressed the offer of the appellants while seeking permission of the High Court to sell the property and thereby committed fraud upon the court, the Bench went on to decide whether the appellants' offer was a bona fide one necessitating its disclosure and answered the same in the negative accepting the belated - and, as the discussion to follow will indicate the specious - plea put forth by the trustees in that regard while contesting the application of the appellants for setting aside the sale. As has been already noticed as early as on 23-1-1990 the appellants had made the offer to purchase the property and in replying thereto by their letter dated 26-2-1990 the trustees not only stated that the offer would be placed before the meeting of the trustees but also intimated the appellants that they would be informed of the decision. Surprisingly, however, instead of informing the appellants about the decision, if any, taken as promised, the trustees filed within a fortnight of their above reply the application seeking permission to sell the property wherein they did not disclose the appellants' offer and on the contrary stated, inter alia, as follows :

"The applicant states that by the order dated 9th February, 1984, this Hon'ble Court had permitted the trustees to sell the schedule property at the highest price offered. The applicant is advised and believe the same to be true that in view of the order of this Hon'ble Court, it would in order for the Trust to sell the property at the aforesaid highest offer received. However the applicant by way of abundant caution has been advised to approach this Hon'ble Court to pray for and obtain a specific permission for the sale of the schedule property at the aforesaid highest offer of Rs. 9,00,000.

The applicant states that apart from calling for offers, the trustees have made enquiries and have been duly satisfied that taking into account the nature and condition of the building, the number of tenants occupying the building and the fact that the property is sought to be sold in 'as is where is' condition along with the tenants without vacant possession being given to the purchaser, the price offered is reasonable. The Trust have also applied for an Income Tax Clearance Certificate as a precondition to the sale and the income tax authorities have, after due enquiries, issued a certificate under Section 230-A of the Income Tax Act.

The applicant states that if the property is not sold at the highest offer now received, it would be difficult to secure other or further offers for the property, which is deteriorating day by day. Considering the meagre return from the property, it would not be in the interests of the Trust to retain the property as such."

15. The assertion made by the trustees in the above-quoted passage that in spite of their best efforts

they could not get any offer above Rs. 9,00,000, which obviously referred to the offer made by the purchasers, was patently incorrect and untrue; and, there cannot be any manner of doubt that by making those incorrect and untrue statements they persuaded the court to grant permission to sell the property for a price of Rs. 9,00,000. If really the trustees were acting bona fide in dealing with the property it was expected of them to first disclose the offer of the appellants and then plead their inability to accept the same detailing the reasons therefor. Instead of so doing not only they suppressed that offer but asserted in no uncertain terms that the highest offer received by them was from the purchasers and that it would be difficult to secure other or further offers for the property. The Bench however did not consider the above facts and circumstances, which unmistakably indicated the oblique designs of the trustees, from a proper perspective and proceeded to upset the finding of the Single Judge on the tenuous ground that their failure to disclose the appellants' offer was justified as it was not a bona fide one. It is pertinent to point out here that the trustees raised the issue regarding the bona fides of the appellants' offer only in support of their inability to accept the same and not in justification of their non-disclosure as held by the Bench.

16. Equally unjustified was the Bench in concluding that the offer of the appellant was not a bona fide one, relying solely upon certain statements made by the trustees in their counter-affidavit (quoted earlier) as according to the Bench they were not controverted through a rejoinder. Even if we proceed on the basis that those statements remained uncontroverted still they cannot be relied upon as they do not stand the test of probability and were clearly made as an afterthought. According to the trustees' version made therein they discussed about the offer of the appellants and then made it known to them (the appellants) that the sale of the property would be on "as is where is condition"; and therefore they asked the appellants to confirm that the offer would be for sale without vacant possession but the appellants did not respond though they had promised to come back. Certain other averments have also been made therein to contend that the appellants were not serious about the offer. No correspondence much less contemporaneous record, nor any other material was produced before the Court in support of the above claim made in the counter-affidavit. At the risk of repetition, it may be recalled that the trustees had earlier intimated the appellants that they would discuss about their offer and asked them to wait for their decision. Instead of keeping to their promise of communicating their decision they moved the court a few days later where they took a diametrically opposite stand. It is evident therefore that there was no basis whatsoever for the trustees to contend, and for that matter the Bench to rely upon only the bald statement of the trustees to hold that the appellants were not serious about their offer.

17. For the foregoing discussion it must be held that the trustees obtained the permission to sell the property to the purchasers practising fraud upon the court and in view of the following observation of this Court in *S. P. Chengalvaraya Naidu v. Jagannath* : (SCC p. 2, para 1)

"It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

The question whether the purchasers purchased the property bona fide subsequent to the permission so granted without notice of the appellants' offer is immaterial in this appeal. We therefore allow this appeal, set aside the impugned order and keeping in view the fact that both the appellants and the purchasers subsequently offered to purchase the property for Rs. 19,40,000, remit the matter to the Division Bench of the High Court to call for fresh offers from them, which, needless to say,

shall not be less than the above amount and grant permission to sell the same at the higher offer received on such terms as law and equity may demand. The appellants shall be entitled to costs of this appeal from the trustees which we assess at Rs. 10,000.